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LIFE INSURANCE AND COMMUNITY PROPERTY IN TEXAS—REVISITED

by

Joe C. Stephens, Jr.*

PLAGIARISM is the chief stock in trade of the law review writer; occasionally, it is bald and unashamed, more frequently it is concealed, perhaps poorly, by mixing two or three previous articles with a half dozen recent cases which themselves are mere rehashes of the same articles and some earlier cases; sometimes the writer's article is based on careful research and a painstaking analysis of the *ex cathedra* pronouncements of the courts; and most rarely of all the new work is truly original, presenting insights that alter the course of the law. This attempt is of the bald and unashamed type, and, in order that the writer's conscience may be clear, he readily acknowledges that all he knows about life insurance law has been culled from Professor W. O. Huie's masterful article in the *Texas Law Review*.¹ With unusual prefacing modesty, it is now stated that Professor Huie can be credited with anything worthwhile which appears here, but that all mistakes, errors, misunderstandings and misinterpretations are this writer's own. The only justification for this article is that the Supreme Court of Texas has in the last decade decided several cases which probably invalidate some of Professor Huie's conclusions.

Professor Huie approached the subject of life insurance and community property from the viewpoint of the legal craftsman eager to collate the cases, find a rational pattern in them, criticize judicial aberrations that mar the pattern, and finally to provide

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¹ Huie, *Community Property Laws as Applied to Life Insurance*, 17 TEXAS L. REV. 121 (1939) and 18 TEXAS L. REV. 121 (1940). For convenience, citations to Professor Huie's article will hereafter be made as "17 HUIE" or "18 HUIE," followed by the page number. References to Professor Huie or Huie throughout this article are based on this writer's interpretation of Professor Huie's article and not on any private conversation held with him; accordingly, such references may (and should) be checked against the original.

direction for future decisions. He was concerned primarily with the technical job of fitting a new form of property, life insurance, into the basic community property concepts. Logical orientation was perhaps more important than sociological desirability; of course, implicit in any argument is some social bias. This article is chiefly concerned with the effect of the decisions on the family welfare and is written on the assumption that Professor Huie's analysis of legal concepts is sound and that following his suggestions will produce desirable results.

BACKGROUND

Such results can be obtained only if the courts (or the legislature, if necessary) recognize the basic problems. Community property is merely one way of protecting the rights of the family, and, in particular, the rights of the wife, but it happens to be the way that Texas has chosen. It, like common law dower, was formulated when all wealth was attributable directly to land. After Texas attained its independence from Mexico the wife's inability to earn a living upon termination of the marriage was recognized by (1) giving her half the land acquired during the marriage, and (2) allowing her, at least on the termination of the marriage by the death of the husband, a lifetime right to occupy and use the homestead even if it was the husband's separate property. In that agrarian culture, the two hundred acre homestead provided her with a place to live and with most of the necessities, if not the amenities, of life. A few urban families, as well as landless couples, might suffer, but the wife's community rights in other forms of property would tend to alleviate this injustice, and in any event the problem was *de minimis*.

The last century has witnessed not only rapid urbanization with its consequent reduction of the "living" value of the homestead, but also drastic changes in the actual forms of "property." Landed wealth has given way to paper wealth, mere evidence of control over property, labor, and goods; the day laborer (so far generally without a guaranteed annual wage but with many unemployment, old age and other similar benefits) has displaced the farmer. In particular life insurance, which was virtually unknown in 1836, is now the sole investment of many families. In fact, the face amount

of life insurance in force has more than trebled in the decade and a half since the publication of Professor Huie's article. If the wife loses her interest in the family insurance, "community property" is probably meaningless for 90% of Texas wives.² Perhaps even more dramatic are the possible adverse tax consequences which may result from the failure to treat life insurance as property, and in appropriate cases community property, but since these affect only a small fraction of the populace, their social significance is not too great.

IS LIFE INSURANCE PROPERTY?

Professor Huie's solution to this family problem was to recognize life insurance (and not just some aspects of it, but the complete bundle of rights) as property and as community property, and to define the rights of the respective spouses in accordance with the rules applicable to any other property, modified only to the extent required by certain peculiar characteristics of life insurance.³ He was critical of the cases whose results were based on the theory that insurance was not property, and for a time it seemed that his arguments were having some effect, as the following quotation from *Womack v. Womack*⁴ indicates:

It is true that in the early decisions of the courts of this country, including the decisions of the courts of this State, it was held in some of them that policies of life insurance were not property. The history of Article 4619, as amended, clearly shows that the Legislature intended to give the term "community property" a broader meaning than it was originally given.

Although the court then quotes with approval a number of statements to the effect that insurance is property, it must be admitted grudgingly that it limited both its own statement and its holding to the cash surrender value of a policy upon divorce of the spouses, and later cases certainly have not justified the optimism of those

² The wife's rights under the community property system which can be enforced against a recalcitrant husband must be distinguished from voluntary provisions by the husband for the wife, which are an act of grace on his part.

³ See 17 HUIE 128 and his criticism of *Martin v. McAllister*, 94 Tex. 567, 63 S.W. 624 (1901); this is the thesis of the entire article.

⁴ 141 Tex. 299, 172 S.W.2d 307, 308 (1943). Following the above quotation the Court then repeats Justice Holmes' statement in *Grigsby v. Russell*, 222 U.S. 149 (1911), that "life insurance has become in our days one of the best recognized forms of investment and self-compelled saving. So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property."

who felt that this case presaged a new attitude on the part of the court.

Causes of the Problem

This difference of opinion between so learned a court and Professor Huie is not without basis. There are several difficulties in applying community property concepts to life insurance. The peculiar nature of life insurance simply further complicates the well known problems encountered in adjusting the theory of community property to modern conditions. An initial difficulty is that, although the community property system is of civil law origin, it has been interpreted by lawyers trained solely in the common law, and at least in the early days these lawyers had access to very few common law sources and even fewer civil law texts, all of the latter being in a foreign language. The second difficulty is adjusting this offspring of the marriage of civil and common law to the new forms of property that have been spawned by the industrial revolution. The courts have succeeded admirably in adapting what is essentially a real property concept to a host of new entities (corporations, complex trusts, unions), to new forms of property (stocks, bonds, multifarious credit relations), and to new needs (principally security in a wage-machine world), and this has shown great maturity and flexibility on the part of our judges.

Flexibility has certainly been characteristic of the courts' decisions with respect to the special requirements of insurance as community property, although a more apt characterization of the cases in this field might substitute the word vacillation for flexibility. Despite the fact that courts in a changing world must espouse change and adopt flexibility, still the change must be predictable, the flexibility rational. Minimum standards of stability demand some certainty in the rules of property, but such standards also require change — change, however, that the social scientist and even the thoughtful practicing attorney can foresee and plan for. Why is it that a court whose decisions have generally met these standards should flounder like a porpoise in a bathtub when it attempts to reconcile life insurance to community property? The reasons that seem most apparent are as follows:

- (1) For practical purposes insurance is a creature of the last

one hundred years, and its twentieth century importance dwarfs its nineteenth century places. During this interval forms of insurance have been multiplying, and its uses have changed, principally from a "risk spreader" to a form of investment; in fact, life insurance is now the primary device for forced saving. The early decisions in most jurisdictions were largely concerned with term insurance, a risk function like fire insurance. It is little wonder, therefore, that nineteenth century courts were unable to perceive in it a new form of property and accordingly felt compelled to classify life insurance as merely a "non-property" contract after they had ceased to be impressed with arguments that insurance policies might be illegal bets on the insured's mortality. Today even the man on the street knows that insurance is property; in truth, he probably knows that it is his only property except a mortgaged car and household appliances, but, of course, the man on the street has no reverence for *stare decisis*.

(2) Most courts have also found their own prior pronouncements intended for the protection of the insurer's contractual rights difficult to reconcile with the property rights of husband and wife *inter se*; and with the burgeoning of modern employer insurance plans of various types, a similar problem is arising in differentiating between the obligations assumed by the employer and the obligations between the spouses with respect to the same insurance. It is, of course, feasible to protect all interested third parties and at the same time recognize certain marital property obligations. For example, courts have protected banks in paying out deposits while defending the rights of spouses in the same deposits. All parties are entitled to such protection as can be extended to each without substantial derogation from the rights of others.

(3) A contract problem also arises out of the right usually reserved by the insured to change the beneficiary. Courts have correctly said that the beneficiary has no vested right until the death of the insured or the release of the right of change itself.⁵ However,

⁵ *Metropolitan Life Insurance Co. v. Baker*, 107 F. Supp. 1 (N.D. Tex. 1952) *rev'd sub. nom. Kemp v. Metropolitan Life Ins. Co.*, 205 F.2d 857 (5th Cir. 1953), commenting, at page 2, on the husband's eliminating his wife as a beneficiary: "[W]here the insured reserves the right to change the beneficiary in [his life] policy, the beneficiary therein obtains no vested interest in the proceeds of the policy prior to the death of the insured." This is a fair statement of the law, but is completely irrelevant as to the wife's rights as a wife.

saying that the wife *as beneficiary* has no vested interest is quite different from saying that the wife *as wife* has no vested interest. A different set of rules are and should be applicable to each situation, and the courts should carefully distinguish between the two and not indiscriminately apply to one situation language which is appropriate only with respect to the other.

(4) The testamentary characteristics of an insurance policy in which the insured has reserved the right to change the beneficiary have in some instances led the courts astray and have in other instances been completely ignored.⁶ It is undeniable that the right to change the beneficiary is an effective will substitute, although certainly one that provides adequate safeguards to take it out of the Statute of Wills, but it is equally undeniable that the husband-insured would not be allowed to retain complete control of any other community property or right to the date of his death and then dispose of his wife's share of such property or right by will. If the husband wishes to take care of the natural objects of his bounty at his death, he need not do so out of his wife's share of any insurance, but should be limited to his own part of the community property, insurance and otherwise.

(5) Doubtless the courts have also been troubled by the fact that usually, if the insured is living after the dissolution of the marriage, it is necessary to continue to pay premiums in order to maintain the policy in force. While not quite so usual, the same fact is true of realty which is being purchased under an installment contract or is subject to purchase money mortgage. Furthermore, modern insurance, except pure term, has a number of facets which require no further payments, such as the cash surrender value and the usual right to convert to a paid up policy or to accept extended term insurance for a specified period, the duration of which is determined by the cash value of the policy.

(6) Similar to the premium payment problem was the situation created by Texas' unique position with respect to insurable interest, which, contrary to the rule in most jurisdictions, required that there

⁶ See *Martin v. Moran*, 32 S.W. 904 (Tex. Civ. App. 1895). A testamentary analogy was most appropriate in this instance because the policy itself provided that its proceeds were payable as the husband should by will direct. However, the difference from the usual revocable inter vivos designation is not of substance, and in legal effect it is identical with the designation of his estate as the beneficiary.

be an insurable interest, not only at the inception of the policy, but at its maturity.⁷ This has been directly troublesome in divorce cases, but the idea may have obscured the courts' vision in other situations. Of course, the fact that an ex-wife has no insurable interest in her former husband's life should have no effect on other rights, such as cash surrender value, which are not connected with his continued life. It would seem, in principle, that the recent legislation on this subject should at least correct some misapprehensions in this field.⁸

(7) Some decisions may also have been led astray by the courts' attempt to protect the wife's interest in lump sum payments from community creditors. Life insurance, as the bulwark of family security, has been especially sheltered by the legislature. By statute the cash surrender value of life insurance which has been in force two years or longer and which is payable to any member of the insured's family is exempt from the claims of the insured's creditors,⁹ and installment payments of the proceeds in favor of any beneficiary are also exempt from the claims of creditors of both the insured and the beneficiary.¹⁰ Not to be outdone by the legislature, the judiciary has also held that the proceeds of a policy on the husband's life payable in a lump sum to the wife are exempt from the claims of community creditors on the theory that the proceeds are the wife's separate property which is not subject to the community debts.¹¹ It might have been more appropriate to leave this decision to the legislature. There can be no academic quarrel with a holding that such proceeds are the wife's separate property since in one sense immediately after the dissolution of any marriage all of the community property has become separate, but it is very doubtful that the husband should retain control over this property until the date of his death and at the same time obtain the benefits of exemption of the proceeds from the claims of community cred-

⁷ See 17 HUIE 140. *Whiteselle v. Northwestern Mutual Life Ins. Co.*, 221 S.W. 575 (Tex. Comm. App. 1920).

⁸ TEX. REV. CIV. STAT. (1925), INSURANCE CODE, art. 3.49-1, liberalizes the rules with respect to insurable interest. Sec. 2 of that article certainly permits any person to be designated by the insured as beneficiary and provides for a continuing insurable interest thereafter.

⁹ TEX. REV. CIV. STAT. (1925), art. 3832a.

¹⁰ TEX. REV. CIV. STAT. (1925), INSURANCE CODE, art. 21.22. This statute was enacted in 1927 and the statute cited in Note 8, *supra*, was enacted in 1929.

¹¹ *San Jacinto Bldg., Inc. v. Brown*, 79 S.W.2d 164 (Tex. Civ. App. 1935) *error ref.*; *Davis v. Magnolia Petroleum Company*, 134 S.W.2d 1042 (Tex. Comm. App. 1940). *Cf. Union Savings Bldg. & Loan Assn. v. Smith*, 62 S.W.2d 175 (Tex. Civ. App. 1933) *error ref.*

itors when he has not complied literally with the legislative requirements for exemption, which are that the proceeds are to be subjected to an installment option.

(8) While it would be hard to prove that the difficulty of valuing insurance has affected the holding in any given case, it seems probable that the courts have preferred to leave this problem to the actuaries, and treating insurance as a mere contract usually avoids the necessity for valuation. Life insurance, with the exception of pure term insurance, has two aspects, one the risk factor and the other the investment factor. Each premium pays partly for pure insurance and partly for investment. The amount of the risk, however, decreases as the cash value of the policy increases until at some point, either when the policy is paid up or endows, there is either no more risk or the cash values already in the policy are sufficient to carry it. A policy's "value" in the sense of normal market values may also vary with outside factors such as the insured's health or a change in the interest rate. Even pure term insurance may have great value if the insured has an incurable cancer. For the sake of simplicity, however, the courts have adhered strictly to two values, the cash surrender value and the face amount of proceeds. Methods of valuation are likely to assume increasing importance in future decisions because of the tremendous number of policies outstanding without cash values, particularly policies acquired in connection with the employment of the insured, such as group insurance or life insurance composing part or all of a pension plan.

Confusion of the Courts

Most lawyers have felt that the principles advocated by Professor Huie had been substantially approved by the Texas Supreme Court because of the holdings of two cases decided in 1943.¹² The first

¹² The lawyers were not alone in this feeling. See *Aaron v. Aaron*, 173 S.W.2d 310 (Tex. Civ. App. 1943) *error ref. w.o.m.* The court was presented with a policy on the husband's life taken out before marriage and paid for with separate funds before marriage and community funds thereafter. The husband made the wife the beneficiary and then changed the beneficiary to his mother, who together with the wife survived him. The jury found (1) a gift of the policy by the husband to the community (a new concept adopted in this and the *Kemp* case but which may be justified by the "passing" theory of *Sherman v. Roe*, *infra* note 21) and (2) that the change of beneficiary was a fraud on the wife. The court accordingly awarded the wife half the proceeds and interpreted *Womack v. Womack*, *infra*, note 16, as holding that insurance was community property. *Kemp v. Metropolitan Life Ins. Co.*, 205 F.2d 857 (5th Cir. 1953) involved a policy taken out before marriage, paid for with separate funds before

of these was *Blackmon v. Hansen*¹³ in which life insurance in the amount of \$110,000 was purchased during the marriage on the life of the husband, payable on death to the wife. All premiums were paid with community funds. The wife, who was also the independent executrix of the husband's estate, paid taxes to the state as if all of the insurance was includible in the estate and then sued the tax collector for a refund of state inheritance tax on the theory that one-half of the proceeds was her share of the community property and not part of the estate of the husband, and accordingly that inheritance taxes should be computed only on the husband's one-half of such proceeds (\$55,000) less the \$40,000 exclusion for insurance payable to a named beneficiary. The defendant contended that the entire \$110,000, subject of course to the \$40,000 exclusion, was taxable in the husband's estate. The court upheld the plaintiff wife's contention, relying on: (1) the fact that the applicable state statute was taken from the federal statute on the basis of which the United States Supreme Court had held that only one-half of the proceeds of a policy issued on a husband's life under similar circumstances was taxable in his estate, and (2) holdings in some prior Texas cases that one-half of the proceeds of a policy on the husband's life payable to his estate, all premiums on which had been paid with community funds, is the property of the wife and that such one-half is not part of the husband's estate. The court did not criticize the cited Texas cases in any way, but, when at a later date in *Warthan v. Haynes*,¹⁴ it became necessary to distinguish the *Blackmon* case, the court stated that the rationale of that opinion was the patterning of the Texas inheritance tax statute on the fed-

marriage and community funds thereafter, a possible gift of the policy to the community, a change of beneficiary to the wife after the marriage, and a later change to the husband's sisters who together with the wife survived. Although the case was remanded, the court interpreted the Texas cases as holding that insurance was property and that any designation of a third party as a beneficiary was a prima facie fraud on the wife and stated that no actual fraudulent intent need be established. Both this case and *Aaron v. Aaron* evidently examined the total community property of the spouses at the death of the husband to see whether or not the wife had been compensated out of other property of the husband (community or separate). This policy was provided by the husband's employer, Magnolia Petroleum Company, and the court says that benefits under any retirement plan would seem to it to be community property.

¹³ 140 Tex. 536, 169 S.W.2d 962 (1943).

¹⁴ *Warthan v. Haynes*, _____ Tex. _____, 288 S.W.2d 481 (1956). This case is the cause of this article. It will frequently be cited as the "*Warthan* case" without further footnoting, despite the fact that the writer understands that law review articles are classified as leading articles, middle articles, tail-end articles, and comments, solely on the number of footnotes.

eral act and that it could not be taken as in any sense a holding with respect to the community nature of the proceeds of the policy.¹⁵

The Texas Supreme Court's most direct holding seemed to be *Womack v. Womack*¹⁶ which involved four insurance policies, all having cash values and all paid for with community funds; three of the policies insured the husband's life with the wife as beneficiary, and one was on the wife's life with the husband as beneficiary. The parties were divorced in 1941 without mention of the policies in the divorce decree, and in a subsequent suit the court upheld the wife's right to obtain one-half of the amount by which the cash surrender values of the policies on the husband's life exceeded the amount of the cash surrender value of the policy on the wife's life. Although the court cited with apparent approval a number of statements to the effect that insurance was property, it limited its holding and its own direct expression of opinion to the conclusion that "the cash surrender value of the policies was community property." In doing so, it expressly overruled *Whiteselle v. Northwestern Mutual Life Insurance Company*¹⁷ and cited *Blackmon v. Hansen*¹⁸ for the proposition that one-half of the proceeds of an insurance policy on the husband's life, paid for with community funds and payable to his estate, are the property of the wife. In the *Warthan* case the court backed water and called attention to the fact that the holding in *Womack v. Womack* was limited solely to the cash

¹⁵ The *Warthan* case makes this distinction at page 484 and there cites *Lang v. Comm'r.*, 304 U.S. 264 (1938). This citation really introduces a type of *renvoi* because the Federal statute obviously does not determine the ownership of the property but relies on applicable state law for such determination. In the *Lang* case the Supreme Court specifically referred to the law of the State of Washington, which clearly gives the wife a community interest in the proceeds of policies, to determine whether or not the entire proceeds should be included in the husband's estate. This creates the anomaly of resting the interpretation of the Texas inheritance tax statute on the interpretation of the federal law in a United States Supreme Court case which in turn was based on the latter court's interpretation of the inheritance law of the State of Washington.

¹⁶ 141 Tex. 299, 172 S.W.2d 307 (1943).

¹⁷ 221 S.W. 575 (Tex. Comm. App. 1920). The divorced wife sued the insurance company for conversion of a policy on the life of her divorced husband whose status, dead or alive, was not mentioned. She claimed a right to reimbursement of half of either the premiums paid with community funds or the cash surrender value, but the Commission of Appeals denied both, saying that the wife had no community interest in the cash surrender values. Note that this suit was solely against the insurer and could have been decided on the contractual rights of the company without reference to the community property question, although the wife, who had lost her insurable interest in the husband's life because of the divorce, had originally been irrevocably designated as the beneficiary.

¹⁸ *Supra* note 13.

surrender values which were not at issue in the *Warthan* case, and rehabilitated the *Whiteselle* case, approving its philosophy except as to the cash surrender value point.

The new course charted by the *Blackmon* and *Womack* decisions was scarcely changed by *Volunteer State Life Insurance Company v. Hardin*.¹⁹ There the husband took out certain policies during the marriage, paid all the premiums with community funds, and designated his wife as primary beneficiary and their son as the alternate. In 1940 the wife died intestate (the son inheriting) and subsequently the husband changed the beneficiary, designating his two sisters, and died in 1944, leaving the son as one of his executors. The son, in a suit which was formally an interpleader, claimed half of the proceeds or, in the alternative, half of the cash surrender value at the date of his mother's death. Although the court certainly used some broad language (which it was later able to cite with approval in holding that insurance was not property) to the effect that the wife had no community interest in the *proceeds*, still its holding that the son could recover neither the proceeds nor one-half of the cash surrender value of the policies at his mother's death was actually predicated not on this broad language but the following grounds: first, that there was no showing that the wife's estate had not received the equivalent value in the partition of the community property, and second, that the cash surrender value had lapsed on the death of the insured.²⁰ Essentially, this holding was more than justified on what for want of a better word might be called the laches of the son. Of course, the son, or his mother's estate, actually may have received other property equivalent to the cash value, but, even if he had not received that value, he had an obligation to his father to make an early claim. Had he done so, his father could undoubtedly have arranged to provide for the sisters from other assets of his estate.

*Sherman v. Roe*²¹ is another case with an unexceptionable holding and some very exceptionable language. The husband had a

¹⁹ 145 Tex. 245, 197 S.W.2d 105 (1946).

²⁰ This concept of the lapse of the cash surrender value on the death of the insured is largely fictional. Of course, no beneficiary would conceive of accepting the cash surrender value when the entire proceeds could be had for the asking. All that has happened is that the term part of the policy (in the amount of the difference between the face amount of the policy and the cash surrender value) has matured and the proceeds are merely the sum of the matured term portion plus the cash surrender value.

²¹ 153 Tex. 1, 262 S.W.2d 393 (1953).

group accidental death policy which had been taken out on his life before marriage, the amount of which, however, having been increased after marriage. It seems clear that the premiums had been paid with separate funds before the marriage and with community funds thereafter. The policy was made payable to the wife, but both husband and wife were killed in a common disaster under such circumstances that it could not be determined who had survived. The Court of Civil Appeals awarded the entire proceeds to the husband's administrator on the ground that the wife's administrator could not prove that she had survived, but the Supreme Court in a perfect King Solomon decision awarded the proceeds equally to the estates of the husband and the wife on the theory that such proceeds were "community effects" on hand at the dissolution of the marriage. The fact that the policy was taken out before marriage and partly paid for with separate funds, and might therefore in whole or in part be the separate property of the husband, was avoided by the following clear statement: "Whatever rights to the proceeds of the insurance might accrue to him [the husband] as his separate property on account of his having procured the insurance for \$2,000 before his marriage to Edna I. Roe or by his payment of premiums before his marriage to her in our opinion passed to the community when, after his marriage to Edna I. Roe, he paid the premiums out of community funds, made her the beneficiary and increased the amount to \$9,000."²² The Court does not amplify this doctrine of "passing," but does say that after such passing the policy became the equivalent of a policy taken out after marriage and paid for entirely with community funds. The court managed to say that "such a policy prior to the insured's death is not property in which the wife owns an interest,"²³ and it is at least arguable from the language that the proceeds never became community property but merely community effects.²⁴ The *Warthan* case said that *Sher-*

²² 262 S.W.2d at 397.

²³ 262 S.W.2d at 396. The court also said at page 397, "Petitioner's claim to one-half of the proceeds of the certificate of insurance herein cannot be sustained on the theory that the certificate was community property and consequently the proceeds must be community property." This position might be acceptable if the doctrine of apportionment is discarded and if the court's own "passing" theory is ignored.

²⁴ The terms *common effects* and *common property* (never community property) are used in TEX. REV. CIV. STAT. (1925), art. 4619, which defines the community estate and which should place the burden of proof on any party contending that any property acquired during marriage is the separate property of either spouse.

man v. Roe's holding would be limited strictly to its facts (simultaneous death) and cited with approval the "no property" language.

Warthan v. Haynes

The ultimate bombshell was delivered in *Warthan v. Haynes*,²⁵ not only because of its holding and the dicta therein, but also because it is apparent from the dissent that the basic problems received the court's attention.²⁶ The majority and the minority were both well acquainted with Professor Huie's article, but the "literal terms of the contract" group won out over the community property dissenters. The facts are simple. The husband and wife, who had no "community" children, but each of whom had children by prior marriages, died intestate in a common disaster, the husband surviving his wife by fifteen to thirty minutes. There were three policies on the husband's life, one a group accident policy taken out during the marriage and paid for with community funds, the second a group life policy also taken out during the marriage and bought with community funds, and the third an ordinary life policy taken out long before the present marriage and paid for with community funds only since the marriage. The wife was the beneficiary of each policy, and for all practical purposes the husband's estate was the alternative beneficiary of each. The dispute was between the respective administrators of the husband and wife. The Court of Civil Appeals had held that the proceeds of the two group policies were community property and that the proceeds of the ordinary life policy should be divided between the community estates and the husband's separate estate.²⁷

The majority of the Supreme Court awarded the proceeds of all three policies to the husband's separate estate without any right of reimbursement to the community for funds used to pay premiums. The court expressly declined to discuss the wife's right, if any, in the cash surrender value since no such contention had been made in the trial court. The Supreme Court relied heavily

²⁵ *Supra* note 14.

²⁶ So far as the writer knows, no amicus curiae briefs were filed, although R. N. Gresham of San Antonio wrote to the Clerk of the Supreme Court a letter dated March 28, 1956 (before rehearing was denied), deploring the holding, chiefly from the tax viewpoint.

²⁷ *Haynes v. Warthan*, 272 S.W.2d 140 (Tex. Civ. App. 1954).

on *Volunteer State Life Insurance Company v. Hardin*, interpreting that previously innocuous decision to mean that life insurance on the life of the husband prior to his death "is not property in which the wife owns an interest," and careful study of the cases does not indicate that it was thinking only of the proceeds. It limited *Sherman v. Roe* to instances of simultaneous death, saying that in the *Warthan* case the policy had not matured at the time of the wife's death and so could not be "community effects" on hand at the dissolution of the marriage. The court also reaffirmed *Martin v. McAllister*,²⁸ Professor Huie's *bete noir*, and that case's view that insurance is not property, just a contract. The court further said that *Blackmon v. Hansen* was merely a tax decision based solely on statutory interpretation.²⁹ Its most shocking pronouncement was its statement that the basis for the holding in *Martin v. Moran*³⁰ might well be that "under certain circumstances" a husband's making a policy payable to his estate was a fraud on his wife. Protecting the wife through the doubtful legal device of denominating the husband's action as fraud would seem poor recompense for the wife's contribution to the community or for the husband's attitude toward his spouse.

Judge Garwood's dissent would give to the community the proceeds of both group policies and to the husband's estate the proceeds of the ordinary life policy subject to the requirement that it reimburse the community for the premiums paid with community funds. He recognizes that the majority's opinion has some support in the cases, but he thinks that the court should base its decision on the fact that the policy, the entire policy and not just

²⁸ 94 Tex. 567, 63 S.W. 624 (1901). The wife died leaving a husband and several children. The dispute concerned the proceeds of a policy, whose face amount evidently exceeded \$5,000, on the wife's life payable to the husband. The court recognized the husband's control over the community subject only to the fraud limitations and, in holding for the husband, said that a policy becomes property only upon the death of the insured in the lifetime of the payee, and that the proceeds were not acquired during the marriage but were received by the husband *after* the wife's death. Of course, the proceeds were in a sense available simultaneously with her death and if the time factor is important *Sherman v. Roe* should be a contrary holding. In addition to criticizing the language of the court, Professor Huie particularly objects to the husband's making a gift to himself of community property, directly or indirectly, there being no evidence that the wife had in any way consented to the insuring of her life or the beneficiary designation. It is, of course, difficult to imagine her not consenting to the procuring of the insurance, since it is improbable that the policy was issued without a physical examination.

²⁹ See note 15, *supra*.

³⁰ *Supra* note 6.

the cash surrender value as in the *Womack* case, is property, and, of course, if it meets the necessary tests, that it is community property. Implicit in this dissent, although not clearly articulated, is the theory that, since the entire policy (each group policy in this case) with all of its rights is community property, then upon the death of the wife prior to the death of the husband, one-half of the policy itself and one-half of all of its rights actually become the property of the wife's estate; and since the policy happened to mature before any other arrangements could be made, one-half of the proceeds belong to the estate of the wife, following the ownership (equitable presumably) of her one-half of the policy. While it would be unfair to claim that any previous decision had gone this far, such a holding would certainly be a logical result of the doctrine that insurance is property, if, as we think entirely possible, the insurable interest problem has now been cured.

If we assume that the husband survives by several years instead of several minutes, a different disposition of any "community policy" would usually be worked out, such as permitting him to purchase the policy for its cash value, but there is nothing inherently wrong in allowing the wife's estate to continue to own one-half of the policy if her next-of-kin or legatees wish to do so and are willing to continue to pay the premiums. Insofar as the insurer is concerned, it actually does not care so long as its liabilities do not exceed those which it has promised to meet, and yet solicitude for the insurer is evidently at the root of the objection of those in the contract camp.³¹ The only valid objection might arise, not from the insuring company, but from an employer which provides policies as part of its employee benefit plans. Of course, in the economic sense the employee pays even those premiums through his labor (no one now doubts that such benefits are part of the employee's compensation) but the employer puts the cash on the line, and the only feasible way to protect the employee-husband if the wife's estate took over

³¹ This overlooks one insurance company practice. A number of companies do issue preferred risk policies which are generally limited to some minimum amount, frequently \$10,000, and carry a lower premium. Division of such a policy between two or more persons (the husband and the wife's estate or her heirs) would increase a company's cost in handling such policies. However, objections from the companies on this ground is unlikely since it would arise in relatively few cases and can be eliminated through actuarial computations of the cost of the policy.

one-half of the policy would be for the estate to reimburse him directly for the value of one-half of the premiums.³²

Probable Results

A practicing lawyer may unreasonably desire to know the present state of the law in order to advise a client of his rights and obligations (tax and otherwise) with respect to his life insurance. For this purpose, let us follow the order of Professor Huie's article, assuming in each instance that the policy was taken out during marriage and the premiums paid with community funds.

(1) *Policy on the husband's life payable to his estate and the wife is living at his death.* Probably, under *Sherman v. Roe* the proceeds are community property or effects since they were on hand at the date of death. However, the *Warthan* case contains language which might indicate a possibility that such proceeds are the husband's separate property unless there is fraud on the husband's part, although of course legal fraud might be found merely from the form of beneficiary designation.

(2) *Policy on the husband's life payable to his estate and the wife predeceases him.* These are the *Warthan* case facts and there seems to be no question that in the absence of fraud the policy is then the separate "something or other" of the husband. It would seem to make no difference whether the wife was named as the primary beneficiary with the husband's estate as the secondary beneficiary, or whether his estate alone was named as the primary beneficiary, except that it would be almost impossible to uncover a fraud on the wife if she were named as the primary beneficiary. The question of the rights of the wife's estate to half of the cash surrender value is an open one, although the *Womack* and *Sherman* cases should in principle entitle her estate to half the cash surren-

³² Cf. *Lee v. Lee*, 112 Tex. 392, 247 S.W. 828 (Tex. Comm. App. 1923); *Kemp v. Metropolitan Life Ins. Co.*, *supra* note 12. Both of these cases recognized the wife's rights in employer benefit or retirement plans, the former apparently uninsured and the latter insured. The employer's objection would be that it was not obtaining the full benefit, in terms of employee loyalty, of the premiums paid by it on the policy or to the plan if one-half of the benefits would ultimately go to someone other than the employee-husband or his heirs; this objection is more than outweighed by the fact that in most instances the loyalty of the wife has been bought with such fringe benefits and that the wife's loyalty strengthens the husband's. It is not uncommon to hear a man say that he would leave his present employment for more lucrative work but that his wife objects to his foregoing his present retirement and related benefits.

der value since it is evidently property and was on hand at the dissolution of the marriage.

(3) *Policy on the husband's life payable to the wife who survives the husband.* It would seem that the proceeds are still the separate property of the wife and that the proceeds are exempt from the claims of community creditors in the absence of fraud. Using as a point of departure the legislative intent as expressed in the statute exempting such proceeds only when they are payable on an installment basis, it is arguable that community creditors should be able to reach such proceeds; for logically in view of the testamentary nature of the disposition (*i.e.* the husband's retention of control until his death) all that has happened is that the proceeds, which are a product of community property, have been given by the husband to the wife (at least as to his half) at the time of his death. The law, however, appears to be otherwise.

(4) *Policy on the wife's life payable to the husband.* Despite Professor Huie's criticism, *Martin v. McAllister* seems to have taken on new life since the majority in the *Warthan* case expressly approved it. Accordingly, at least on the death of the wife, the proceeds of such a policy are the husband's separate property, even though the wife may not have consented, and possibly could not have consented, to such a gift and even though the husband, as manager of the community, has thoughtfully managed a gift to himself. This gift might not be of "property," but most of us would consider it rather valuable.

(5) *Policy on the husband's life payable to a third party.*⁸³ There are no cases which would materially change Professor

⁸³ No case has been found involving insurance on the wife's life payable to a third party; probably the reason for this is that the husband as manager of the community would certainly have consented at least to the procurement of the policy, and he is normally the only person who could complain. There are three exceptions to this. (1) The wife is manager of the special community, that is, the fruits of her own labor and the income from her separate property, and as a lot of us can testify, she may frequently be the *de facto*, if not the *de jure* manager of the general community and as such she might easily procure such insurance without the husband's consent. (2) The husband might procure a large policy on the wife's life payable, say, to her stepchildren (presumably his children by a prior marriage), thus converting all of the community property to insurance and laying the groundwork for a dispute between the parties entitled to the wife's estate and the beneficiaries. (3) The wife as insured secretly changes the beneficiaries on a policy taken out on her life by her husband. The same principles governing the insurance on the husband's life payable to a third party should be applicable to a case arising under any of the three foregoing exceptions.

Huie's conclusions on this question³⁴ and it would seem still to depend on the fraud issue which in turn involves (a) intent, (b) size of the gift in relation to the size of the community estate,³⁵ (c) the relationship of the beneficiary-donee to the husband or wife and perhaps the financial needs of the donee, and (d) the possibility of the wife's being compensated for her loss out of her husband's share of other community property or his separate property—the compensation theory apparently having been approved in *Volunteer State Life Insurance Company v. Hardin*.

(6) *Proceeds during the life of both spouses*. Normally such proceeds are community, although in certain instances of irrevocable designation of the wife as beneficiary (and obviously in the event of a complete assignment of the policy and all incidents of ownership therein to the wife) such proceeds would be her separate property as a gift from her husband. If the wife can make a similar gift of "community property" (her right to do so seems improbable) then the husband could also receive the proceeds as his separate property under similar circumstances.

(7) *Divorce of the Spouses*. *Womack v. Womack* has certainly clarified the rights of the parties on divorce. The cash surrender value is community property, each spouse being entitled to half thereof subject, of course, to the equity powers of the divorce court. The policy itself usually becomes the property of the insured, subject, of course, to a lien or some other right in favor of the other spouse for half the cash surrender value; however, although no case has ever raised the issue because of the lack of insurable interest in the divorced spouse, if that difficulty has

³⁴ Cf. *Kemp v. Metropolitan Life Insurance Co.*, supra, note 12. The court said that any designation of a third party was prima facie or presumptively fraudulent on the basis that the wife is entitled to the protection of TEX. REV. CIV. STAT. (1925), Art. 3996, governing fraudulent conveyances. What proof would be required to rebut this presumption?

³⁵ A subsidiary problem involves the determination of the effective date of the gift, which might be either (a) when each premium is paid or (b) when the incidents of ownership are surrendered by the husband, or (c) when the proceeds become payable. The individual premium will usually be small compared with the community estate, whereas the face amount of the policy may be relatively large. Unless we accept the view hereinafter urged that one-half of the proceeds should belong to the wife if the husband reserves the right to change the beneficiary until his death, without reference to any fraud at all, then the time to make the comparison of the gift to the total estate to determine the existence of "fraud" under "the gift of a substantial part of the estate" theory should certainly be the death of the husband, if he reserves the right to change the beneficiary until that time.

been avoided by the new Texas statute, there is no logical reason why each spouse could not continue to own one-half of the policy itself.

No point will here be made with respect to the right of the respective spouses in policies which were separate in origin, usually because purchased before marriage, but have been paid for partly with separate funds and partly with community funds. The cases we have discussed throw little light on Professor Huie's suggestion of apportionment. This theory was adopted by the Court of Civil Appeals in the *Warthan* case, but was, of course, not decided by the Supreme Court; the dissenting judges indicated that the community estate should be reimbursed for the premiums paid, which would amount to a denial of the apportionment theory. Neither apportionment nor reimbursement is perfect; reimbursement presents problems because the community is regaining in full something that has been consumed in part, that is, the protection afforded against the risk of death, which is the principal element in term insurance but which becomes smaller and smaller as higher premium policies are considered. Apportionment presents actuarial difficulties,⁸⁶ but it is probably the fairest result economically, and Professor Huie has made a strong argument for it on a theoretical legal basis. The "passing" theory of *Sherman v. Roe* can hardly be thought to have wide applicability if indeed it will ever again be used without at least some window dressing.

TAX ASPECTS

What are the tax implications of the *Warthan* case? The Tax Court's decision in *The Chase National Bank v. Commissioner*⁸⁷ is illustrative of the problem. In that case the husband had set

⁸⁶ These difficulties are similar to (but different in effect from) those encountered under the reimbursement theory. Assume an ordinary life policy in force for forty years, twenty years prior to the marriage and twenty thereafter. The policy would be half community and half separate on the apportionment theory. The actuarial risk of death has increased each year although the amount of risk underwritten by the insurer has decreased each year. However, the premiums paid during marriage are smaller because of the purchase at an early age. The cash surrender normally increases at a progressively greater rate during the later years, partly because the earlier cash values are actually earning a return which is reflected in the increased value of the policy, and partly because the amount at risk is smaller. Older policies were usually written on less favorable mortality tables but on more favorable interest rates. It is still probable that apportionment is the most equitable method of division.

⁸⁷ 25 T. C. No. 74 (1955).

up a trust of which Chase was the successor trustee. The corpus of the trust was composed solely of life insurance policies on the life of the husband taken out during the marriage and paid for entirely with community funds. The trust became irrevocable on the husband's death and thereafter the income was payable to the wife with remainders over to designated parties. The wife, who survived the husband, accepted the trust, and, omitting certain transferee problems, the issue was whether or not the wife had made a gift of her half of the proceeds. The Tax Court, interpreting the Texas cases better than most Texas lawyers, held that she had made no gift, citing several decisions establishing that, while the wife had a community interest in the cash surrender value during the marriage itself, on the termination of the marriage by the death of the husband she had no interest in proceeds payable to a named beneficiary (here the trust) and that the cash surrender value had disappeared into thin air on the death of the husband. The Tax Court said, "The distinction may appear to be a bit unusual, but we must take the law of Texas as we find it. Until the Texas courts indicate otherwise, we must assume that the foregoing cases correctly establish the law of Texas..." Of course, consistent application of the logic of this case requires that at the death of the husband the entire proceeds of the policies payable to the insurance trust be included in his estate for estate tax purposes. The holding as to the insurance trust is to be contrasted with a contrary holding in the same case concerning an identical trust except that the corpus was composed of community securities; the difference in the corpus alone induced the court to hold that the wife had made a gift of her one-half of the securities, less the actuarial value of the life estate she retained.

This means that on the *Warthan* facts, the husband having survived by fifteen minutes, his estate should pay an estate tax on the entire proceeds. Furthermore, some fantastic results can be reached if we accept the dictum in the *Warthan* case to the effect that the rationale of *Martin v. Moran*,³⁸ holding that proceeds payable to the husband's estate upon dissolution of the marriage by his death are community, *might* be based upon the fact that such

³⁸ *Supra* note 6.

a beneficiary designation is fraudulent as against the wife. For example, the husband dies leaving a policy payable to his estate and, in a frequently used estate plan, provides by his will for a testamentary trust, the income payable to his wife for life with a special power of appointment in the wife or a gift over to the children of the marriage. On these facts it would be difficult to detect any fraud against the wife, and accordingly the entire proceeds might fall into the testamentary trust and be taxable in the estate of the husband. Examples could be multiplied, but the reader's patience must be exhausted, and such nightmares will be left to each individual's own imagination. Of course, it is submitted that no such holding would ever be made by the Supreme Court of Texas and that the doctrine of *Sherman v. Roe*, that the proceeds were community effects on hand at the dissolution of the marriage, would automatically be applied, thus eliminating the search for fraud, legal or otherwise. However, the *Warthan* facts alone probably put Texas in the unfavorable position of separate property states where the most careful tax planning requires that the husband die prior to his wife's death (actuarially he predeceases her two out of three times) in order not to lose the marital deduction.³⁹ *The Chase National Bank* holding also means that wherever a third party is named as a beneficiary of a policy on the husband's life the entire proceeds must be included in his estate for estate tax purposes unless we are fortunate enough to convict the dead of fraud.

The estate planner must solve these problems. What can he do?

³⁹ Conceivably Texas could be in a less favorable position than a common law state. Presumably if the Texas husband predeceases his wife and the proceeds of a life insurance policy on his life, paid for solely with community funds, are payable to his wife, his estate is entitled to a marital deduction if the proceeds of the insurance policy are considered as his separate property. Yet this presumption runs afoul of the terms of INT. REV. CODE OF 1954, § 2056 (c) (2) (B), which provide that the adjusted gross estate shall be determined by subtracting from the gross estate, among other community property items, "the amount receivable as insurance under policies on the life of the decedent, to the extent purchased with premiums or other consideration paid out of property held as such community property." A literal reading of that language would exclude the proceeds as above stated from the benefits of the marital deduction, but the intent of Congress was obviously merely to exclude what was actually "community life insurance." See the report of the Senate Finance Committee, 1948-1 CUM. BULL. 344. Furthermore, Rev. Rul. 232, 1953-2 CUM. BULL. 268, construes the identical provision of the 1939 Code in accordance with Congressional intent rather than on the literal terms of the statute, and presumably the rationale of this ruling would result in treating the proceeds in our hypothetical case as eligible for the marital deduction.

Probably he will use the partition statute.⁴⁰ First, two identical policies will be taken out, one owned by the husband and one by the wife, both on his life, and the premiums will be paid by husband and wife respectively with separate funds resulting from a partition of community funds. Of course, this partition gambit must be repeated annually. Or it may be possible merely to buy two identical policies, one owned by the wife and the other by the husband, and pay for each with community funds. There should be no gift tax in this situation since we have an even swap, but the question arises as to whether the wife has the power to give away community funds.⁴¹ Then who or what should be designated as the beneficiary? Perhaps the only safe designation except the wife herself is an appropriately drafted insurance trust. The tax lawyer is already looked on as a necromancer by the general public and all this black magic will do nothing to change the impression. This may also speed up a trend, which has been growing in recent years, toward a complete transfer of the ownership of policies; many conservative lawyers deplore this tendency, but they may now be helpless despite the undesirable effects resulting from such transfers.

This bleak picture has its brighter aspects. Every practicing attorney has been faced with the horror-stricken look on the face of some successful husband who has learned for the first time that on his death his wife, whom he loves dearly but whose business judgment he trusts not at all, will own one-half of "his" property to do with as she pleases. That "do with" has dire connotations in his imagination. For various reasons he is unwilling to put his insurance on settlement options. Now we can tell him (or can we?) that he can set up a revocable trust like *The Chase National Bank* insurance trust and be certain of at least a lifetime of protection for his wife and even a gift over to his children if

⁴⁰ TEX. REV. CIV. STAT. (1925), art. 4624 (a), which was enacted in 1949, permits spouses to partition community property by a procedure which is relatively simple if the partition is of equal undivided interests. Thereafter, the interest of each spouse is separate property.

⁴¹ Section 2 of Art. 4624 (a), *supra* note 40, specifically provides that the partition shall not be construed as restricting the right of the husband to make a gift of community property to the wife. Omission of similar language with respect to the wife would indicate that she does not have the same right. This would not bother us if we could know that the proceeds of a policy on the husband's life were his separate property, but the Supreme Court's position is sufficiently tentative so that the wife might end up owning $\frac{3}{4}$ of the proceeds instead of $\frac{1}{2}$.

he is willing to pay the tax consequences. This penalty may not be too frightening in small to medium estates.

In addition to the fact that the attorney cannot now with assuredness advise his client of the tax or substantive law rules governing community life insurance, there are more significant dangers. The modern urban family, particularly of the lower and middle income groups, is depending more and more heavily on life insurance for family security. In fact, a pension plan and a GI home, supplemented with Social Security and individual life insurance, *are* the family property. If we do not strictly adhere to the view that life insurance is community property, discarding any idea that the insurance is the separate property of the husband which he may leave to a third party, we may unwittingly be junking the entire system and irreparably harming many wives whose contributions to the family welfare, this writer naively believes, are just as great as those of her husband. The tax consequences are also grave. Normally, however, the family with a tax problem will consult an attorney who is expected to formulate a plan which will avoid the pitfalls, but the lawyer's task has been immeasurably increased with a resulting increase in expense. Furthermore, there are any number of wealthy persons who fail to have their estates planned and who will fall into tax traps. Perhaps all of this could be overlooked except for the inescapable conclusion that these problems could readily be solved by our courts, although one might imply from the *Warthan* case that this capability is not being realized.

CONCLUSION

Whether there are clear answers to all of the problems discussed in this article cannot now be said. The Tax Court has left their solution to the Texas courts. Because of the intricacies of the subject, the Texas courts in turn may prefer to refer the problems to the legislature; however, the writer feels these are matters for judicial interpretation, particularly since the legislature has not been conspicuously successful in its dealings with community property. It is submitted that the most obvious difficulties could be avoided by adherence to three propositions: (1)

That each and every policy and all of its attributes are property⁴² and to the extent taken out during marriage and paid for with community funds are community property; for this purpose an employer's payment of premiums during the marriage should be considered community contributions, since they are as much a part of the employee's salary as his take home pay or his withholding tax. (2) That the husband's retention of the incidents of ownership until his death, particularly the right to change the beneficiary, renders any beneficiary designation essentially a testamentary act, and accordingly the husband may not dispose of his wife's half by any beneficiary designation, whether to his estate or any third party, any more than he may dispose of her half of any other community property by will.⁴³ (3) That the insurable interest statute should be interpreted as giving the divorced wife, or the deceased wife's estate or her heirs, an insurable interest in the husband's life.⁴⁴ To these basic propositions might be added some other rules such as Professor Huie's suggestion that apportionment be applied to determine the ownership

⁴² Recognizing life insurance as property at all times and for all purposes would be the selection of one of two conflicting lines of authority running through the cases. See also note 31, *supra*.

⁴³ Such a holding would reverse prior authorities, but the reversal would not be as substantial a change as would at first appear if the designation of a third party as a beneficiary is presumptively fraudulent as indicated in *Kemp v. Metropolitan Life Ins. Co.*, *supra* note 12. Other states so hold. The Washington cases deny the husband practically all power to give away community property, including life insurance, and California by statute has adopted the same rule unless the wife consents in writing, and the statute has been applied to life insurance. See 18 HUIE 123-26. The rule could be limited to testamentary gifts in Texas without defeating any reasonable family plans, since the husband can still make appropriate provisions out of his half of the community, particularly if the courts also adopt the view that permits third party beneficiary designations to stand if the wife has been compensated therefor out of other property, separate or community, belonging to the husband.

⁴⁴ Such an interpretation would be no *tour de force*. TEX. REV. CIV. STAT. (1925), INSURANCE CODE, art. 3.49-1, provides that if the insured has in writing designated any person as beneficiary or owner of a policy either in an application or an appropriate change of beneficiary form, then thereafter the person so designated shall always have an insurable interest. Certainly once the wife has been designated as a beneficiary by the husband she has a permanent insurable interest. If she has not been so designated, then does she have an insurable interest after divorce? It is submitted that she does because (a) the requirement that the designation be in writing is merely precautionary and (b) the husband has used the wife's funds for half the premiums both as a statutory trustee and as a resulting or constructive trustee. Furthermore, the statute in effect does away with the old Texas insurable interest rule as to any policy actually applied for by the insured. It would not seem too far fetched to say that if the insured uses a stranger's funds to purchase a policy on his life, the stranger (or his heirs, etc.) could trace the funds and even recover the entire proceeds if the insured had died meanwhile. Should the wife or her heirs, who are at the mercy of the husband, receive less consideration than the total stranger?

of insurance which is partly separate and partly community rather than merely reimbursing the community, and that the existence of fraud (if based on the test that any gift is fraudulent if it constitutes a substantial portion of the community estate) be determined in relation to the face amount of the policy rather than the amount of each individual premium payment. The three basic propositions would, however, tend to equate insurance with other community property. The writer realizes some of the complexities and has tried to avoid some of the omniscience of the law review writer from whose *obiter dicta* there is no more appeal than from similar dicta by the Supreme Court. With that approach it can only be said that a reorientation along the lines here suggested might be helpful.